Petition

83-679

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALBERT PAUL,
Petitioner,
and
BEATRICE PAUL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether the trial Judge should have ordered a new trial in light of his finding that there was a "good possibility" that the trial testimony of the government's principal witness was false.

II. Whether the trial court should have entered a judgment of acquittal because of a lack of substantial evidence from which a jury could reasonably find beyond a reasonable doubt that Petitioner Beatrice Paul was guilty of evading corporate income taxes?

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OPINIONS BELOW

The judgment order of the United States Court of Appeals for the Third Circuit, denying Petitioners' Joint Motion for Rehearing En Banc, is reproduced in the Appendix at 1a.

The judgment order of the United States Court of Appeals for the Third Circuit, affirming the judgment of the United States District Court, is reproduced in the Appendix at 3a.

The opinion of the United States District Court for the Eastern District of Pennsylvania, which was affirmed on appeal, is unreported. This opinion is reproduced in the Appendix at 5a.

JURISDICTION

The judgment order of the United States Court of Appeals for the Third Circuit denying Petitioners' Joint Motion for Rehearing En Banc, which is reproduced in the Appendix at 1a, was entered on August 19, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Federal Rule of Criminal Procedure Rule 33:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant

the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilt or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

A. Introduction

The United States Court of Appeals for the Third Circuit, by affirming Petitioners' convictions, upheld the application of a standard of law that is in conflict with the relevant standards applied in other circuits. The circuit courts are in conflict because this Court has not definitively ruled on the central issue presented by this Petition: whether a new trial must be granted in a criminal case when the trial court finds that there is a "good possibility" that the trial testimony of the government's principal witness was false.

The present appeal involves a highly unusual criminal case in which Petitioners, who are husband and wife, have been convicted on the basis of the testimony of their soon to be former son-in-law,

which testimony was clearly tainted. This is not a case of newly discovered evidence challenging the credibility of an insignificant witness on a peripheral issue. Rather, the trial court specifically found that there was a "good possibility" that the trial testimony of the government's principal witness was false.

The trial court's finding was based on a post-trial statement made by this key prosecution witness at an unrelated deposition. This statement involved a key issue at trial. The trial judge concluded that it was "very hard to regard [the two statements] as co-existing in the same universe of truth telling." Considering that this crucial government witness was the only person to provide direct evidence of Petitioners' involvement in the evasion of corporate income taxes, a jury must be given the opportunity to judge this witness at a new trial in light of his post-trial statements.

Petitioners Beatrice Paul and Albert Paul respectfully assert that there are three reasons to grant a writ to review the decision of the Court of Appeals for the Third Circuit:

FIRST, the Third Circuit rendered a decision that applied a standard of law involving motions for new trials that conflicts with the standard adopted by other circuit courts of appeal. Indeed, circuit courts have applied different standards to motions for new trials based on false testimony by a material government witness because this Court has never decided the crucial federal question of what standard should apply in cases of this nature.

SECOND, Petitioners must be afforded a new trial because the trial judge determined that there was a "good possibility" that the trial testimony of the government's principal witness was false. The fair administration of justice requires this Court to exercise its supervisory powers to prevent the conviction of Petitioners based on evidence that is clearly tainted.

THIRD, there was insufficient evidence from which a jury could reasonably find beyond a reasonable doubt that Petitioner Beatrice Paul was guilty of evading corporate income taxes. Mrs. Paul's conviction should be reversed because she was

minimally involved in the corporation's activities, lacked business know-how, and was unsophistocated and uneducated. The government presented no direct evidence of Mrs. Paul's knowledge or intent to evade corporate income taxes.

Each of these considerations is sufficient for the granting of a writ to review the decision of the court below.

B. Procedural History

On March 1, 1982, Petitioners Albert and Beatrice Paul were convicted of three counts of corporate income tax evasion in violation of 26 U.S.C. §7201. The government's principal witness against them was their son-in-law, Ronald Brown. Subsequent to trial, but prior to Petitioners' sentencing, Brown testified at a deposition involving his pending divorce from Petitioners' daughter.

After this deposition, Petitioners moved for a new trial in the district court. Petitioners argued that based upon statements Brown made at the deposi-

tion, that Brown's trial testimony was false. On October 22, 1982, the trial court denied the post-trial motions seeking a judgment of acquittal or a new trial. On November 16, 1982, Petitioners were sentenced.

On July 29, 1983, the United States Court of Appeals for the Third Circuit affirmed the judgment of the United States District Court. On August 19, 1983, the Third Circuit denied Petitioners' Joint Motion for Rehearing En Banc.

C. Statement Of Essential Facts

1. Background

Albert and Beatrice Paul have been married for more than 45 years. In the late 1940's, Albert Paul, who had not completed grade school and who had begun working full time at the age of 14, started his own business. The business, run from an extra bedroom in the Pauls' home, was the cleaning of oil tanks and the sale of oil salvaged from the tank cleaning process. Through hard work the business prospered and was incorporated in 1969 as Paul Tank Cleaning Services, Inc. (hereinafter "PTCS").

The change in the form of doing business was preceded by the arrival of Ronald Brown, the Pauls' son-in-law. Brown, otherwise employed when he married the Pauls' daughter, learned the business at Albert Paul's side and according to Brown, soon "took over most of the. . .operation." According to the PTCS accountant, Brown's arrival was a godsend, not only because of Albert Paul's declining health, but because of his business acumen and salesmanship. He quickly became a valuable employee and a trusted family member. Brown, however, proved unworthy of that trust. During the period covered by the indictment, Brown systematically cheated Albert and Beatrice Paul and PTCS.

Brown was the man "out running the men on the job" who, in view of Albert Paul's declining health, had daily contact with PTCS customers. The customers came to think of Brown as part of PTCS. Consequently, it was not surprising to them when invoices for services rendered or products sold by PTCS began to include the notation "MAKE CHECK PAYABLE TO RON BROWN ONLY." Brown's audacity went

further. In order to divert corporate funds to himself, Brown resurrected invoices from the days when PTCS was unincorporated, which were entitled "Paul Oil Service" (hereinafter POS). Incredibly, he would occasionally cross out the name "Paul" at the top of the invoice and insert "Brown". According to Brown it was these "POS" and "Ronald Brown" invoices which were not reported on the PTCS Federal Income Tax returns.

The corporate funds stolen by Brown were received by him in the form of checks in payment of the POS and "Ronald Brown" invoices. Initially these checks were cashed by Brown or deposited by him into a bank account owned by him and his wife. Later, the checks were either cashed by Brown, deposited by him into an account jointly owned by him and his wife, or into the account owned jointly by him and Albert Paul. The account owned by Albert Paul and Brown had been established to receive rental checks from property owned jointly by them. It was Brown who decided into which account the stolen funds were to be deposited.

Of the almost $450,000 stolen by Brown, all but $800 was either cashed by him or deposited by him into non-corporate accounts. Additionally, virtually all of the funds stolen consisted of checks endorsed by and/or made payable to Ronald Brown or to POS as the result of Brown's resurrection of the POS invoices. The "paper trail" used by the government to prove its case led only to Ronald Brown. It was only through the testimony of Brown that the government was able to provide direct evidence of Albert and Beatrice Paul's involvement in the offense.

By the time Ronald Brown appeared to testify against his parents-in-law, a number of significant events had occurred in his life. First, Brown separated from his wife Barbara, the Paul's daughter, and divorce proceedings were in progress. Second, Brown was indicted on three counts of corporate income tax evasion and three counts of personal income tax evasion. Pursuant to a plea agreement, Brown plead guilty to one count of personal and one count of corporate income tax evasion and agreed to testify on the government's behalf. In order

to obtain this plea agreement, Brown proferred certain information to the government which he was expected to repeat at the trial. Brown knew that failure to testify truthfully could result in the rescission of the plea agreement and his possible prosecution for not only personal and corporate tax evasion but perjury.

Third, Brown's employment with PTCS was terminated by Albert Paul. Soon after his termination from PTCS, Brown tried to "protect...his interest." Brown accomplished this by conveying assets owned by PTCS to a newly formed corporation, Silver Tank Company, Inc., which was owned by his mother, Emily Silver. Finally, in the waning moments of his tenure at PTCS, Brown attempted to obtain unemployment compensation benefits for his mother by claiming that she was about to be employed by PTCS.

2. Ronald Brown's Trial Testimony And Post-Trial Deposition

At trial, Brown testified that the checks he received in payment of the invoices he had sent

were not reported on the PTCS corporate income tax return. He further testified that these checks were cashed or deposited by him and the proceeds split with the Pauls. No other witness could provide testimony directly implicating the Pauls with the disposition of these checks, an element which was critical to the government's case against the Pauls. According to the trial judge, Brown's credibility was of very, very great consequence to the prosecution. As stated by the Court below, Brown's testimony was "clearly of central importance" to the government's case. (Appendix at 7a).

The credibility of Brown's testimony was under attack at the trial and significant inroads were made. Numerous inconsistencies in the testimony were demonstrated. For example, he admitted to having given false testimony about his college degree, his year of graduation from college, lost wages on an insurance claim and corporate expenses.

The evidence most damaging to Brown's credibility and the government's case arose after the trial. The government sought to prove its case against the Pauls by providing a connection

between the Pauls and the "cashed down" checks received by Brown which Brown claimed he shared with the Pauls. This connection was sought by eliciting testimony from Brown that Albert Paul in years during and after those set forth in the indictment had in his possession large amounts of cash; the proceeds of the split. Specifically the government elicited testimony concerning a cash loan of $50,000 from Albert Paul to Brown to enable Brown to purchase a boat. Brown's testimony in this regard was as follows:

Q. YOU TESTIFIED THAT YOU BOUGHT A BOAT IN 1979.

A. THAT'S CORRECT.

Q. HOW DID YOU PAY FOR THAT BOAT?

A. WITH CASH.

Q. WHERE DID YOU GET THAT CASH?

A. CASH I HAD AND $50,000 I BORROWED FROM AL.

Q. WHO IS AL?

A. AL PAUL.

Q. WAS THAT A LOAN?

A. YES, IT WAS.

Q. HOW WAS THE LOAN MADE TO YOU?

A. IN CASH.

After the trial, Brown testified at a deposition held in conjunction with the divorce proceedings. The deposition was for the purpose of determining marital assets held by Brown. Brown, questioned by his estranged wife's lawyer about the source of funds used to purchase the same boat, testified as follows:

Q. YOU SAID THAT YOUR MOTHER ADVANCED YOU $50,000 TOWARDS THE PURCHASE OF THAT BOAT?

A. THAT'S CORRECT.

Q. WAS THAT SUPPOSED TO BE A LOAN TO YOU AND BARBARA OR WAS SHE PURCHASING AN INTEREST?

A. IT WAS A LOAN.

Q. TO YOU AND BARBARA?

A. THAT'S CORRECT.

Q. SO THAT THE TITLE OF THE BOAT WAS TAKEN BY YOU AND BARBARA ALTHOUGH IT --

A. NO, THE TITLE OF THE BOAT WAS TAKEN BY MY MOTHER.

Q. BUT IT WAS A LOAN AND SHE DIDN'T BUY AN INTEREST.

A. NO.

MR. MYERS*: WHO IS "SHE"?

THE WITNESS: HE IS TALKING ABOUT MY MOTHER.

BY MR. LISI**:

Q. WHEN I SAY "SHE, I AM TALKING ABOUT YOUR MOTHER, EMILY SILVER, DID NOT BUY ANY INTEREST OF THE BOAT BY VIRTUE OF THE $50,000?

A. NO.

Q. HAVE YOU EVER TESTIFIED PREVIOUSLY THAT THE $50,000 USED TO BUY THE BOAT CAME FROM MR. AND MRS. PAUL?

A. NO.

Q. YOU NEVER TESTIFIED TO THAT IN ANY FEDERAL COURT PROCEEDING?

A. NOT TO MY RECOLLECTION.

Q. IF YOU HAD TESTIFIED TO THAT IN A PREVIOUS PROCEEDING, THAT WOULD BE AN ERROR?

A. PARDON ME?

Q. IF YOU HAD TESTIFIED IN A PROCEEDING THAT THE $50,000 WAS BORROWED FROM YOUR MOTHER-IN-LAW AND FATHER-IN-LAW, ALBERT AND BEATRICE PAUL, FOR THE PURPOSE OF BUYING A BOAT, THAT WOULD NOT BE ACCURATE?

A. THAT WOULD NOT BE ACCURATE.

---

*Ronald Brown's attorney.

**Barbara Brown's attorney.

3. Argument On Post-Trial Motions

At argument on post-trial motions for a new trial based on Brown's varied descriptions of the boat transaction, the trial judge questioned the prosecutor about the inconsistency between Brown's testimony at trial and his testimony at the subsequent deposition.

THE COURT: Well, let's take that as given. Is there any way of reconciling the narrative given in our court and in the deposition?

MR. GLAZER: Well —

THE COURT: With respect to the financing of the purchase of the boat in 1979.

* * *

THE COURT: And how do we reconcile the testimony that Mr. Brown's mother advanced him $50,000 toward the purchase of the boat with the testimony in our court that the boat was paid for with cash plus $50,000 that he borrowed from Al, namely, Al Paul?

MR. GLAZER: Well, the only thing I can think of is no one asked him, where did you get the money the cash that you said you had?

THE COURT: You mean there were two $50,000's?

MR. GLAZER: It's hard to say.

THE COURT: That's hard, isn't it, to reconcile with the subsequent colloquy in the deposition in which Mr. Lisi inquires about the 50,000?

THE COURT:

It seems to me that we have two transcripts here which it's very hard to regard as co-existing in the same universe of truth telling, though I appreciate it may not be very easy to—well, in the first instance, I don't know that there is any basis for telling, even if the two are not to be reconciled, which is the correct version, if either. (Emphasis added).

The importance of Brown's testimony to the government's case and the impact the deposition would have on a jury were also emphasized by the trial judge:

> ... certainly Mr. Brown was the central witness for the Government, and if one supposed that the jury were persuaded that Mr. Brown was testifying falsely to it, even if the issue fairly be regarded as a secondary one, I don't think it's easy then to say, well, there is no reason to suppose the jury would have come to a different conclusion.

Petitioner contends that the trial court erroneously characterized the manner in which Brown financed the boat transaction as "secondary." Evidence of the Paul's possession of a "cash hoard" was part of the government's theory of proving evasion of the corporate income tax by the Pauls.

As stated by the prosecutor "... possession of a large amount of money would be indicative of the prior participation in the evasion."

At a hearing concerning Brown's testimony, Brown was questioned by counsel for the Pauls, the government and the trial judge. Upon completion of the hearing the trial judge stated his position concerning the post-trial motion and Brown's testimony. The Court stated:

> THE COURT: I think something of a puzzle here. I think that what we have are three possibilities. Perhaps it's more than three, but in a gross sense it may be that Mr. Brown was testifying falsely. When I use the term falsely I am talking about a range that runs from perjury to disingenuouity by which I mean an intention to mislead, although perhaps not having the full elements of perjury. It may be that Mr. Brown testified falsely at the April deposition. It may be that he testified falsely at the February trial. It may be that he testified truthfully at both, which was, indeed, the burden of his testimony today. I don't think today's hearing points us unerringly in any one of those three directions. My sense is that I am strictly bound by the Larrison standard as it's been adopted by our Court of Appeals in Myers, 484 F.2d 113. I can't recite that I am "reasonably well satisfied that the testimony given by a material witness is false." I think there is a good possibility that Mr. Brown's testimony in February was false and

I think there is a rather better possibility he testified falsely either in February or in April, in which event he also testified falsely today, but I don't feel that I can say to a strong degree of certainty that he must have been testifying falsely at one or another of those occasions, even though I think there is a good possibility of that.

Now, maybe the legal distillate of all of that is simply: all right. Defendants haven't made the showing called for by Larrison and Meyers and that's the end of it and the convictions stand. There is something of an additional ingredient, I think, offered by Judge Weber's opinion in 1979 in Willis, 467 Fed. Supp. 1111 in the sense that under the influence of the Second Circuit's opinion in Stofsky, 527 F.2d 237, he is concerned about what the jury may feel not merely with respect to the elements of factual proof but about the jury's reaction if they see a material witness as having perjured himself with respect to credibility and Judge Weber there talks about if the jury had known that Sharpick had testified falsely we believe that they easily could have chosen to disregard his entire testimony or to give it substantially less weight. That's not quite the words of probability that the Second Circuit used in Stofsky. It's rather stronger than the, "A jury might have reached a different conclusion," that "A jury might have reached a different conclusion" the court talked about in Larrison and the Third Circuit repeated in Meyers. Of course, in all of those cases, the given was that there had been false testimony where here it can only be a supposition of real possibility.

* * *

We have here a case in which the credibility of Mr. Brown is of very, very great

consequence to the government's case. I don't suppose anybody listening to Mr. Brown thought he was a paragon. The jury evidently believed him. Had they been persuaded that he was lying to them, albeit about a factual issue that's not central to the case, it is certainly strongly arguable, to use Judge Weber's phrase, "They easily could have chosen to disregard his entire testimony or at least to give it substantially less weight.

Brown's post-trial testimony raises serious questions about the veracity of his trial testimony, the extend it tainted the trial testimony considered by the jury, the weight it should have been given by the jury and the impact it would have if it was presented to the jury.

4. The Government's Case Against Mrs. Paul

Specifically, with regard to the government's case against Mrs. Paul, the government attempted to establish that: 1) Ronald Brown and Albert Paul suppressed company sales by sending out bills made payable to Brown at his home or POS at the Faunce Street address, the Paul's residence; 2) Brown received most of the money and opened a joint bank account with Albert Paul in which he deposited much

of the unreported income; 3) Brown falsified company expense data; and 4) Brown split the cash with the Pauls, which was really just Mr. Paul since Brown could not recall ever giving even a single dollar to Mrs. Paul. Brown worked in the business in the years in question. There was testimony from Brown himself that he was running most of the operations involved in the business. Both Brown and the company's accountant Ross said that Brown in fact ran the business and had control of it during the period in question.

Mrs. Paul, a housewife and grandmother, worked in the business part-time answering the phone, typing bills when she was told to do so by her husband or son-in-law, and routinely signing payroll and the regular checking account checks, sometimes in blank. The accountant Ross said he went to the Paul home once a month for a period of four to ten hours to perform basic bookkeeping and accounting functions for the company. According to Ross, he did basic bookkeeping because Mrs. Paul was unable to perform even the simplest bookkeeping tasks. Mrs. Paul merely accumulated

invoices and gave them to Ross. Ross said she didn't even have the ability to prepare invoices on her own. If Ross had questions, Mrs. Paul didn't have the answers even if the questions were simple ones, so he would have to see her husband or son-in-law. Mrs. Paul also passed on expense items to Ross although she had nothing to do with them.

While Ross was in the Paul home working on the business records, Mrs. Paul would be cooking, housecleaning, doing laundry and going shopping. According to Ross, Mrs. Paul also usually got his lunch. Ross further testified that Mrs. Paul trusted her son-in-law and did what he said.

Mrs. Paul did not sign the corporate tax returns involved in this case nor was there any evidence presented by the government that she ever even read them. Mrs. Paul had nothing to do with Brown's false expenses or with the joint bank account where much of the siphoned funds were deposited nor with the deposit tickets for reported income nor with any of the unreported checks. Indeed, Brown testified that he could not remember giving a

single dollar of the alleged hidden income to Mrs. Paul.

The government's position at trial was that Mrs. Paul as "chief administrative officer" of the business was therefore somehow responsible for the company's tax returns. Mrs. Paul was listed on the tax returns as secretary-treasurer of the company but there was no testimony that she actually performed any functions of a corporate officer other than merely signing routine checks. There was absolutely no testimony of any connection she had with the preparation or filing of the company income tax returns.

The government's theory as to Mrs. Paul's responsibility was that she failed to give the accountant Ross the suppressed sales invoices, but there was no clear testimony that she even knew of the suppressed invoices let alone had them in her possession at any time. Brown, however, testified that there was a "money book" which he kept and that it showed work schedules for payroll purposes as well as some of the sales that were never reported. When Brown became ill

and was hospitalized, Mrs. Paul used the book and made entries in it. But each of the companies listed in the money book involving unreported income were companies for whom other sales and business transactions had in fact been reported. It was unclear how Mrs. Paul could be expected to know which sales from which companies were reported or unreported.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER STANDARD TO APPLY ON A MOTION FOR A NEW TRIAL BASED ON FALSE TESTIMONY BY THE GOVERNMENT'S PRINCIPAL WITNESS

In order to decide this appeal, the Third Circuit was required to determine: (1) What standard applies to motions for new trials in criminal cases where the trial court finds there was a good possibility that the trial testimony of the government's principal witness was false? and (2) Whether the trial court properly applied that standard in denying appellants' motion for new trial?

The criteria which should apply in cases of this nature has not been decided by the United

States Supreme Court. United States v. Johnson, 327 U.S. 106, 111 n.5 (1946). Varying standards have been adopted by the Circuit Courts of Appeal. The Second and Ninth Circuits have adopted the following analysis for motions for new trials in cases of this nature:

> Upon discovery of previous trial perjury by a government witness, the court should decide whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness.

United States v. Kransy, 607 F.2d 840 (9th Cir. 1979) and United States v. Stofsky, 527 F.2d 237, 246 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976).

The First, Fourth, Fifth, Tenth and D.C. Circuit Courts of Appeal have adopted the so-called Larrison standard requiring a new trial where: (1) the court is reasonably well satisfied that the testimony given by a material witness is false; (2) that without it a jury might have reached a different conclusion; and (3) that the party

seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial. See United States v. Wright, 625 F.2d 1017, 1020 (1st Cir. 1980); United States v. Wallace, 528 F.2d 863, 866 n.3 (4th Cir. 1976); United States v. Hamilton, 559 F.2d 1370, 1373 n.6 (5th Cir. 1977); United States v. Briole, 465 F.2d 1018, 1022 (10th Cir. 1972); and United States v. Mangieri, 694 F.2d 1270, 1286 (D.C. Cir. 1982).

The Larrison standard was specifically rejected by the Second and Ninth Circuit Courts of Appeal in Stofsky and Kransy, respectively. Indeed, the Second Circuit severely criticized the Larrison standard, observing:

> [T]he test, if literally applied, should require reversal in cases of perjury with respect to even minor matters, especially in light of the standard jury instruction that upon finding that a witness had deliberately proffered false testimony in part, the jury may disregard his entire testimony. Thus, once it is shown that a material witness has intentionally lied with respect to any matter, it is difficult to deny that the jury, had it known of the lie, "might" have acquitted.

Stofsky, 527 F.2d at 245-46. The Stofsky court stated further that courts following the Larrison approach were not troubled by its "speculative nature" and in many cases "have not hesitated to deny new trials in cases where they have purported to apply it." Id. at 246 (footnote omitted).

At times, circuit courts have not completely endorsed any rule. Thus, the Fifth Circuit has cited the Larrison rule with tacit approval, but decided that the defendant failed to demonstrate the necessity of a new trial as judged by either standard. See, e.g., United States v. Hamilton, 559 F.2d 1370, 1372-73, 1374 & n.8 (5th Cir. 1977). In United States v. Meyers, 484 F.2d 113, 117 (3d Cir. 1973), the Court held that the evidence warranted a new trial pursuant to either rule.

The absence of a guiding decision from this Court leaves lower courts in doubt when considering motions for new trials based upon allegations of false testimony by government witnesses. The conflict among the circuit courts justifies the grant of certiorari to review the judgment below.

II. A NEW TRIAL IS WARRANTED BECAUSE THE TRIAL JUDGE DETERMINED THAT THERE WAS A "GOOD POSSIBILITY" THAT THE TRIAL TESTIMONY OF THE GOVERNMENT'S PRINCIPAL WITNESS WAS FALSE

The exercise of this Court's supervisory powers over the administration of justice requires that a new trial be granted under the circumstances of this case.

The trial court determined that this case did not qualify for the relief requested under the principles of Larrison v. United States, 24 F.2d 82 (7th Cir. 1928) (cited with approval in United States v. Meyers, 484 F.2d 113 (3d Cir. 1973)). The trial court was not reasonably satisfied that Brown's trial testimony was false.[1] Albert and Beatrice Paul, however, are entitled to a new trial on other grounds. Post-trial testimony by the government's principal witness, Ronald Brown, lead the trial court to conclude that there is a "good possibility" that the witness lied during the trial about a matter, Petitioners assert, was of consider-

1. Petitioners submit that the trial court erred in this regard and that a new trial is warranted under either the Larrison or Berry (Berry v. State, 10 Ga. 510 (Ga. 1951)) standard.

able import to the government's case. A fair trial requires that this testimony be made available to the jury.

This case is quite different from the numerous appeals for new trials on the grounds of newly discovered evidence. This is not a case of newly discovered evidence challenging the credibility of an insignificant witness on a peripheral issue. Here the trial judge made a finding that there was a "good possibility" that the trial testimony of the government's principal witness was false. This finding was based upon evidence not presented to the jury. The subject matter of the tainted testimony was the method by which Brown, the Pauls' son-in-law, financed the purchase of a boat. Brown's trial testimony was that he financed the purchase, in part, with a $50,000 cash loan from Albert Paul. This testimony, the government concedes, constituted evidence of the Pauls' participation in the offenses charged. The trial court found that there was a "good possibility" that this testimony was false.

How would the jury react if it were confronted with the same information which has raised these doubts in the trial judge's mind? Petitioners assert that the jury would not have continued to believe Brown because this additional evidence would be the "proverbial straw that broke the camel's back." United States v. Lipowski, 423 F. Supp. 864, 867 (D.N.J. 1976). Brown's credibility was much at issue and, according to the trial judge, his testimony was clearly of central importance to the government's case. (Appendix at 7a). Petitioners argue that if the jury had Brown's varied descriptions of the boat transaction before it, Brown's credibility would have been destroyed and with it the government's case. Considering the trial court's finding, a conviction which rests on this tainted evidence is patently unfair.

The combination of the doubt about how a jury would react to Brown's post-trial testimony and the questionable fairness of a conviction based on a body of evidence tainted by this more than possibly false testimony, warrants reversal and remand for a new trial.

"Only the jury can determine what it could do on a different body of evidence..." Mesarosh v. United States, 352 U.S. 1, 12 (1956). This deference to the jury function is the reason why numerous courts, when presented with evidence which casts real doubt on the veracity of material testimony by an important government witness, have deferred to the jury by ordering a new trial. Such was the case in Benton v. United States, 188 F.2d 625 (D.C. Cir. 1950). There shortly after the defendant had been convicted of taking indecent liberties with a child, a motion for a new trial was filed based upon the affidavit of the mother of the victim. The affidavit varied substantially from the trial testimony of the child, upon which the conviction rested almost entirely. The court of appeals in reversing the trial court held that under these circumstances, "a fair trial requires that the mother's testimony be made available to the jury ... so that [the mother's testimony] be heard and considered along with that of the others called to testify...." 188 F.2d at 627.

Significantly, in reaching this conclusion the court did not find it necessary to conclude that the child had lied at the trial. The substantial variance between the child's testimony and the mother's affidavit was sufficient to warrant a new trial "in the interest of justice."

Brown's varied descriptions of the financing of the boat transaction warrant the same result here. What impact would this have on a jury if one considers the trial judge's quandary in reconciling the trial and the deposition testimony? The trial judge concluded that it was "very hard to regard [the two descriptions] as co-existing in the same universe of truth telling." Considering the importance of this witness and the trial court's own significant doubts about his credibility, a jury should have been given the opportunity to decide whether the convictions could still stand on a different body of evidence.

Likewise, in United States v. Segelman, 83 F. Supp. 890 (W.D. Pa. 1949), the trial court granted a motion for a new trial to permit the interrogation of the government's chief witness

with regard to a perjury conviction apparently unrelated to the charge against the defendant. At the trial the cross-examination was not permitted since the witness' conviction was on appeal. The issue before the court was whether a new trial should be granted to permit this cross-examination now that the witness' conviction had been sustained. The court in ordering a new trial stated:

> In this case the counts in the indictment could not be sustained without the testimony of the [government's principle witness], and the court, therefore, believes that the defendant should have the opportunity and the privilege of developing the fact that said witness has been convicted of the crime of perjury. This should be done in the interest of justice in order that the jury will have the opportunity to pass upon the credibility of said witness.

83 F. Supp. at 893.

As in Segelman, the conviction of the Pauls rested heavily on the testimony of one witness: Brown; whose testimony was according to the trial judge of "central importance" to the government's case (Appendix at 7a); whose credibility the trial judge stated was of "very, very great con-

sequence" to the prosecution; and who was the only witness to provide direct testimony of the Pauls' involvement in the evasion of corporate income taxes. Without Brown's testimony the government's case against the Pauls was marginal. A jury should have been given the opportunity to judge Brown and the government's case in light of his post-trial statements.

Benton and Segelman, do not stand alone in granting new trials under these circumstances. See United States v. Sam Goody, Inc., 675 F.2d 17, 19 (2d Cir. 1982); Helwig v. United States, 162 F.2d 837 (6th Cir. 1947); United States v. Atkinson, 429 F. Supp. 880 (E.D. N.C. 1977) and United States v. Schartner, 285 F. Supp. 193 (E.D. Pa. 1967).

These courts have so ruled because the "interest of justice" provision of Federal Rule of Criminal Procedure 33 counsels this result. This provision is broader in scope than that part of the Rule permitting a new trial for newly discovered evidence. Orfield, New Trial in Federal Criminal Cases, 2 Vill. L. Rev. 293, 307 (1957). The decision to grant a new trial "in the interest

of justice" is within the trial court's discretion and should be granted where the trial judge has the gravest doubts as to the credibility of an important witness. Id at 307 and United States v. Troche, 213 F.2d 401, 405 (2d Cir. 19)(Frank, J. dissenting).

Trials are conducted under the direction of the trial court and are a search for the truth. A motion for a new trial should be granted, where it appears that an important fact is unknown to the jury. In the interest of justice, such new information is made available to the jury for them to determine the credibility of the government's witness, Benton v. United States, supra, and, in turn, the guilt or innocence of the defendants. It is, of course, the jury, not the trial judge, which alone can determine what it would do on a different body of evidence than that which was heard at the first trial. Mesarosh v. United States, supra.

The trial court here was in much the same situation as the court in Benton v. United States, supra. There the trial court should have had serious doubts about the credibility of the witness

upon whom the conviction almost entirely rested and should have granted a new trial. Here the trial court expressed its doubts about the veracity of Brown's testimony but failed to take the second step of granting a new trial to permit a jury to pass on Brown's credibility and the quality of the government's case. This Court is asked to exercise its supervisory power over the administration of justice and to reverse and remand for a new trial.

This inherent power of the court was first set forth as an independent basis for decision in McNabb v. United States, 318 U.S. 322, 340 (1943). There, the Supreme Court described the power as follows:

> Judicial supervision of the administration of criminal justice in the Federal Courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reasons which are summarized as "due process of law" and below which we reach what is really trial by force.

318 U.S. at 340.

The inherent supervisory authority of federal courts has been used to do justice in particular situations that do not lend themselves to rules of general application. United States v. Gonsalves, 691 F.2d 1310, 1316 (9th Cir. 1982). Since McNabb, supra, the power has been used to cover a broad range of judicial actions by all three levels of the judiciary for "the purposes of (1) formulating new rules of fairness of general application, (2) enforcing judicial compliance with already existing standards of fairness, and (3) avoiding a miscarriage of justice in particular cases where already existing procedures have proven inadequate." Id. at 1315-1316.

The exercise of the supervisory power has been the basis for ordering new trials in numerous cases. See, e.g., United States v. Allen, 539 F. Supp. 296, 320 (C.D. Ca. 1982); Note, Judge Made Supervisory Power of the Federal Courts, 53 Geo. L. J. 1050 (1964), and Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656 (1962). Of particular importance to this case are the so called "tainted evidence cases," Communist Party

v. Subversive Activities Control Board, 351 U.S. 115 (1956) and Mesarosh v. United States, supra. These cases reflect the court's concern about the reliability of evidence upon which a conviction or determination has been made. These cases also reveal a willingness of the court "to order new trial on a substantial allegation of perjured or unreliable testimony, without requiring an affirmative showing of prejudice, in order to eliminate any possibility of prejudice or unfairness in the federal administration of justice." 53 Geo. L. J. at 1059.

The first case in this line is Communist Party v. Subversive Activities Control Board, supra. There, the defendants sought to adduce new evidence before the Board, showing that government witnesses, upon whom the Board had relied heavily in making a determination, had testified falsely before the Board and had committed perjury in testimony in other cases dealing with similar subject matter. The defendants unsuccessfully sought an order from the circuit court for an additional hearing. In reversing and remanding the matter to the Board

for further proceedings, the Supreme Court noted that its decision was not based upon constitutional grounds but was based upon its exercise of its supervisory powers. The Court stated:

> The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See: McNabb v. United States, 318 U.S. 322, 63 S. Ct. 608, 87 L. Ed. 819. Therefore, fastidious regard for the honor of the administration of justice requires the court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.
>
> * * *
>
> When uncontested challenge is made that a finding of subversive design by petitioner was in part the product of three perjurious witnesses, it does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board's findings. If these witnesses in fact committed perjury in testifying in other cases substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited and the Board's determination must duly take this fact into account. We cannot pass upon a record containing

> such challenged testimony. We find it necessary to dispose of the case on the grounds we do, not in order to avoid a constitutional adjudication but because the fair administration of justice requires it.

351 U.S. at 124-125.

In Mesarosh v. United States, supra, the tainted evidence standard was also applied. There, while the appeal of a criminal conviction was pending, the government called to the Court's attention that the testimony given in other proceedings by an important government witness at the trial was untrue, although not perjurious. While adhering to its position that the witness' testimony at trial was entirely truthful and credible, the government suggested, in light of these developments, that the truthfulness of the witness' testimony at the trial should now be determined by the trial court after a hearing.

The Supreme Court found that the witness' credibility had been totally discredited and that conviction could not stand on such tainted evidence. In language applicable to this case,

the Court described why it was exercising its supervisory powers in reversing the conviction.

> [The witness], by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.
>
> * * *
>
> The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide by them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial.

352 U.S. at 14.

In remanding for a new trial, the Supreme Court declined to adopt the government's suggestion of an evidentiary hearing into the witness' credibility stating, "The district judge was not the proper agency to determine that there was sufficient evidence at the trial other than that given by [the witness] to sustain the conviction. Only the jury can determine what it would do on a different body of evidence...." 352 U.S. at 12.

The Mesarosh application of the supervisory power has been applied in several other cases where doubts about the credibility of a government witness are raised as a result of testimony in subsequent proceedings. Williams v. United States, 500 F.2d 105 (9th Cir. 1974) and United States v. Chisum, 436 F.2d 645 (9th Cir. 1971).

The interest of justice should have resulted in the district court granting a new trial. This court in reviewing the decision of the district court and the order of the Court of Appeals must determine whether its supervisory powers over the administration of justice require the avoidance of criminal convictions based upon tainted evidence such as that present in this case.

Clearly, Brown's credibility was of very, very great consequence to the government's case. There is a strong probability that the case against the Pauls would not stand without Brown's testimony or without the jury believing him. The evidence against Albert and Beatrice Paul was predominantly based upon the testimony of Ronald Brown. Virtually all the documentary evidence

revealed that the diverted corporate funds were received by Brown. It was through Brown's testimony that the government sought to link Albert and Beatrice Paul with the diverted corporate funds which constituted the understated income set forth in the Indictment. Brown testified that he split the diverted proceeds with Albert Paul, and that Albert Paul had in his possession large amounts of cash; the proceeds of the split. As a means of proving that Albert Paul participated in the offense, evidence of his possession of large amounts of cash was presented by the government.

As a result of post-trial events, the truthfulness of Brown's testimony concerning the $50,000 loan has been called into question by the trial court. The doubts raised in the trial judge's mind are based on information not available to the jury that convicted the Pauls.

What would the jury do if it was presented with Mr. Brown's varied descriptions concerning the manner in which he financed the purchase of the boat? A prediction is not frivolously made.

This testimony does not deal with a collateral issue which merely provides additional grounds for impeaching Mr. Brown. It goes to the heart of the government's case. It directly challenges the truthfulness of Brown's testimony that Albert and Beatrice Paul participated in the evasion of corporate taxes. The conviction of the Pauls rested almost entirely on Brown's testimony. Petitioners submit that the jury would reach a different conclusion if Brown's chicanery were brought to its attention, but this decision is not for the trial court. Mesarosh v. United States, supra.

Under the principles set forth above, a new trial is appropriate. Here, serious doubts about the testimony of a major government witness have been raised by the trial judge as a result of that witnesses post-trial testimony. Here, as in Mesarosh v. United States, supra, the reservoir of evidence in this trial has been poisoned by Brown's tainted testimony. The body of trial testimony may have been palatable before Brown's testimony at the divorce deposition. But that

testimony sprued bildge water into the reservoir of trial evidence, and a conviction based on that tainted evidence should not be swallowed by any judicial system.

III. THERE IS INSUFFICIENT EVIDENCE FROM WHICH A JURY COULD REASONABLY FIND BEYOND A REASONABLE DOUBT THAT PETITIONER BEATRICE PAUL WAS GUILTY OF EVADING CORPORATE INCOME TAXES

Petitioner Beatrice Paul was convicted of evading corporate income taxes merely because she was Petitioner Albert Paul's wife and because PTCS was run out of her home. She was not convicted because of the evidence against her. While convictions must be viewed in the afterglow of what is most favorable to the government, there must be substantial evidence, which is both clear and unequivocal, showing a convicted defendant's individual knowledge and participation in the crime. United States v. Palmeri, 630 F.2d 182 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981).

The evidence showed Mrs. Paul to be a housewife who worked only part-time for the company out of her home, doing routine tasks of answering

the phone and typing. She also signed routine payroll and routine regular checking account checks, the latter sometimes in blank. She typed invoices but only when told to do so by her husband or her son-in-law. On this record it is clear that she had no options of her own. She did what she was told to do and did nothing on her own initiative.

The accountant, Ross, in a moment of hyperbole, identified Mrs. Paul as the "sole administrative officer" of the company—to the extent of answering the phone, giving employees phone messages, typing invoices, and preparing payroll checks. The government promoted her at argument to the jury as the "chief administrative officer" whose major function was meeting with the accountant Ross.

Ross, however, actually recognized Mrs. Paul's function with him to be nothing more exhaulted than that of an unskilled clerk. She merely passed onto him invoices which had been prepared on her husband's or son-in-law's orders; bank deposit slips prepared by her son-in-law; and expense data prepared by her son-in-law.

Mrs. Paul, according to Ross, couldn't even perform somple tasks of a very basic bookkeeping system he devised for her. If he had questions about anything significant she was the last person he would ask because she didn't understand what she or he was doing. She couldn't even reconcile bank statements.

When Ross was there in her house four to six hours one day a month for thirty years, she went shopping or was cleaning the house, or cooking or doing the laundry or getting his lunch. Her involvement in PTCS was inconsequential and what little she did was over her head.

Her involvement in the false corporate tax returns was even less. She didn't sign them nor is there any evidence that she ever even saw them. Although there was no testimony that Mrs. Paul knew of the unreported sales, the government nonetheless theorized that she withheld sales information from the accountant.

There were notations in a book in which Mrs. Paul made entries while Brown was ill in 1974. The government asserts that this "money book"

establishes both Mrs. Paul's knowledge of the unreported sales as well as her withholding the information from Ross. But each company for which the government proved unreported sales from the money book also had had sales reported by the company. How was Mrs. Paul, a part-time, unskilled clerk who couldn't perform even the simplest of bookkeeping functions to know which sales from which company were reported or unreported?

In the United States v. Palmeri, 630 F.2d 192 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981), the defendant was one of several non-union business agents accused of receiving kick-backs in the form of personal unsecured bank loans in return for a deposit of union pension and welfare funds at the same banks. The Third Circuit held that the evidence of the defendant's specific intent to defraud to be insufficient for conviction. The Court's decision was not affected by clear evidence that the defendant could not repay unsecured loans he had received as a result of his union connections. It is similarly noteworthy that the defendant's failure to disclose prior loans in

his application for new funds was also revealed at trial.

As in Palmeri, there is no clear evidence of Mrs. Paul's knowledge or intent to evade corporate taxes of her husband's company. Since she performed no affirmative act to perpetrate the corporate tax fraud and since she lacked knowledge of it in view of her limited intellectual resources, there is a lack of substantial evidence that would justify her conviction.

In United States v. Klein, 515 F.2d 751 (3d Cir. 1975), a defendant, Luick, was a public fire insurance adjuster charged with mail fraud. The evidence showed that the owners of a building had hired an arsonist to destroy their property and that Luick had paid the arsonist a referral fee, and that the arsonist had previously referred fire adjustments to Luick in the past with a similar fee arrangement. Luick even admitted that the fire had been adjusted with his "eyes closed." This court held there was insufficient evidence to convict Luick of mail fraud. Writing

for the Court, Judge Hunter found that the payment of the referral fee gave rise to no inference that the arsonist had reason to be on notice of suspicious dealings.

In both Palmeri and Klein, the defendants clearly participated much more in the alleged criminal activity than Mrs. Paul did in this case.

In United States v. Price, 623 F.2d 587 (9th Cir. 1980) the Ninth Circuit reversed a wife's conviction for mail fraud on grounds of insufficient evidence where she merely answered the phone, wrote checks and took care of some bookkeeping and even wrote fake letters to customers of her husband's fraudulent business. Mrs. Price only worked for her husband for about three months, the same length of time Mrs. Paul made notations in the money book.

The Ninth Circuit ruled that Mrs. Price's minimal involvement in the business, coupled with the lack of direct evidence of her intent or knowledge and her lack of business experience required her conviction to be reversed since there

was no sufficient relevant evidence from which a jury could reasonably find her guilty beyond a reasonable doubt.

Mrs. Paul, like Mrs. Price, was minimally involved in her husband's business, lacked business know-how, was unsophisticated and uneducated, and no direct evidence was presented to the jury of her knowledge or intent to evade corporate taxes. Like Mrs. Price, Mrs. Paul's conviction should be reversed since there is insufficient evidence here from which a jury could reasonably infer Mrs. Paul guilty beyond a reasonable doubt.

IV. CONCLUSION

The Petitioners pray that the Court will grant this Writ so as to facilitate the exercise of its supervisory powers to grant them a new trial. They ask this Court to hold that a conviction cannot stand when the trial court finds that there is a "good possibility" that the trial testimony of the government's principal witness was false. In addition, Petitioner Beatrice

Paul requests that this Court reverse her conviction on the ground that there is insufficient evidence from which a jury could reasonably infer that she was guilty beyond a reasonable doubt.

Respectfully submitted,

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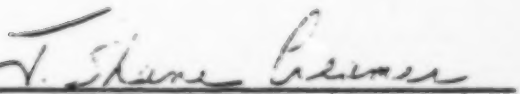
By: 

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APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-1762/63

UNITED STATES OF AMERICA

v.

ALBERT PAUL,
Appellant in No. 82-1762

v.

BEATRICE PAUL,
Appellant in Nos. 82-1763

(Crim. Nos. 81-00029-01/02)

SUR PETITION FOR REHEARING
IN BANC

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, Circuit Judges, and TEITELBAUM, District Judge*

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in

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* As to panel rehearing only.

regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

BY THE COURT,

s/_____
Circuit Judge

DATED:

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 82-1762 and 82-1763

UNITED STATES OF AMERICA

v.

ALBERT PAUL,

Appellant in 82-1762

and

BEATRICE PAUL,

Appellant in 82-1763

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Crim. No. 81-00029-01/02)
(Honorable Louis H. Pollak)

Argued July 19, 1983

Before: ADAMS and HIGGINBOTHAM, Circuit Judges,
and TEITELBAUM, District Judge*

JUDGMENT ORDER

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* Honorable Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation

After considering all contentions raised by appellants, namely, that (I) a new trial is warranted under the circumstances of this case where the trial judge determined that there was a good possibility that the trial testimony of the Government's principal witness was false, and (II) there is insufficient evidence from which a jury could reasonably find Mrs. Paul guilty of evading corporate income taxes beyond a reasonable doubt, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/_____
Circuit Judge

ATTEST:

s/_____

DATED:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION

v. :

ALBERT PAUL
BEATRICE PAUL : NO. 81-00029

Philadelphia, Pennsylvania

October 22, 1982

BEFORE: HONORABLE LOUIS H. POLLAK, J.

OPINION OF THE COURT

APPEARANCES:

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Assistant United States Attorney
for the Government

DUANE, MORRIS & HECKSCHER
BY: THOMAS W. OSTRANDER, ESQ.
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THE COURT: Thank you all for coming here at this early hour with a view to final disposition of a motion for a new trial which has been pending for a substantial period of time.

I appreciate the efforts of counsel to assist me in the resolution of what has seemed to me a difficult issue through the submission of supplementary memoranda.

The basic problem that gives rise to this motion is, I think, fairly simply stated, the trial of Mr. and Mrs. Paul, a trial for violation of the income tax laws.

A principal witness against them was their former son-in-law, Mr. Brown. His testimony with respect to many transactions in which the Pauls and Mr. Brown and the family corporation of which all three were officials was of central importance in the Government's case. I do not mean to suggest that Mr. Brown's testimony bore the entire brunt of the Government's case, but it was clearly of central importance, and not surprisingly, Mr. Brown's testimony was challenged by the testimony of other witnesses, and his credibility was much at issue.

At one portion of his trial testimony Mr. Brown testified that he had received a loan in the amount of $50,000 in cash from Mr. Paul, monies that were to be utilized by Mr. Brown for the purchase of a boat.

Subsequent to Mr. and Mrs. Paul's conviction, Mr. Brown gave testimony by way of deposition in a proceeding that was a part of the divorce litigation between Mr. Brown and Mrs. Brown, Mr. and Mrs. Paul's daughter, which addressed the question of the respective property claim of Mr. and Mrs. Brown.

In the course of that deposition, Mr. Brown testified that he had received a loan from his mother in the sum of $50,000 toward the purchase of a boat. When asked whether he had not previously given testimony that he had a loan of $50,000 for the purchase of a boat by Mr. and Mrs. Paul, Mr. Brown said "No".

The basis for the motion for a new trial was the asserted inconsistency between Mr. Brown's deposition testimony and his trial testimony.

At a hearing in this court on the motion for a new trial Mr. Brown took the witness stand -- he was not accompanied by counsel, but he expressed his understanding of his situation and was by his own statement prepared to testify without counsel.

The questions put to Mr. Brown by counsel for Mr. and Mrs. Paul -- let me modify that -- counsel for Mr. Paul and counsel for Mrs. Paul, because they were separately represented -- by counsel for the Government, and by the Court, focused on the apparent inconsistencies between the trial and deposition testimonies. Mr. Brown agreed that in both instances he was referring to the same boat, that is to say, there was no suggestion that $50,000.00 was borrowed from Mr. Paul toward the purchase of one boat and $50,000.00 borrowed from the senior Mrs. Brown, the witness's mother, looking toward the purchase of another boat.

When asked how it was that he had said "No" when asked on deposition whether he had not previously testified that he had borrowed funds from Mr. and Mrs. Paul looking toward the purchase of a boat, Mr. Brown insisted that his response was

an accurate one, and the accuracy, so he explained, was rooted in the fact that the trial testimony which he had given was that he had been loaned $50,000.00 by Mr. Paul, or Al, as he referred to him, not, that is to say, by Mr. Paul and Mrs. Paul.

At the close of the hearing in July, I said that I do not in the face of Mr. Brown's testimony before me on the motion for a new trial, and his prior deposition testimony, and his prior-to-that trial testimony, conclude that I was "reasonably satisfied" that his testimony at the trial of Mr. and Mrs. Paul was false testimony. I said that it was my judgment that there were three possibilities: One, that the trial testimony was false; two, that the deposition testimony was false; - and in neither of those instances the testimony before me in July would have been false - and third, that the testimony on all three occasions was true.

For the testimony on all three occasions to have been true one would, I think, have to conclude that Mr. Brown, while not having perjured himself on any issue, was not very forthcoming on deposition, that

is to say, that he had said what was literally true, but what he was likely to have realized was likely to lead his listeners to come away with a false impression if they credited his deposition testimony that there had been no transaction of the kind to which he had testified at the trial of Mr. and Mrs. Paul, that is to say, a loan from Mr. Paul of $50,000.00 going toward the boat in question.

I think I should say parenthetically at this point that the cost of the boat was enough so that both a $50,000.00 loan from Mr. Paul and a $50,000.00 loan from Mr. Brown's mother could have been utilized. The gross cost of the boat was upwards of $100,000.00. It was in the neighborhood of $160,000.00.

I told counsel in July that I could not say that I was reasonably satisfied that Mr. Brown's testimony at the trial of Mr. and Mrs. Paul was false, but that that seemed to me to remain one of three active possibilities, the others being those that I have stated, that that testimony was true and the deposition testimony was false, or that he was testifying truthfully, albeit narrowly, on

both occasions, and here in court on the motion for a new trial.

I stated that to counsel because I wished advice of the following nature: Had I been satisfied that Mr. Brown had testified falsely at the trial of Mr. and Mrs. Paul, or had I been satisfied that that was reasonably likely, or to use the exact language of our Court of Appeals in the Myers case, 484 F2d, 113, 116, based in turn on Larrison, 24 F2d, 82, page 87, the venerable decision of the Seventh Circuit, had I been "reasonably well satisfied that the testimony given by [Mr. Brown was close]" I would have gone on under the compulsion of Myers and Larrison to determine that had the jury not had that false testimony before it, the jury might have come to a different conclusion, and hence, that a new trial was in order.

I appreciate that it can be argued, indeed, very plausibly, that the matter with respect to which Mr. Brown was giving testimony at the trial, namely, the asserted loan from Mr. Paul, was not central to the Government's case, and that without

that testimony it is entirely possible, indeed, perhaps probable, that the jury would have reached the same verdict. Im not prepared to disagree even with the statement that it is probable that the jury could have come to the same place without that testimony, but when the test is couched in the Larrison-Myers terms it might have been, I would conclude that I would have been compelled to grant a new trial had I been satisfied that Mr. Brown was testifying falsely in that respect at the criminal trial.

My request for assistance in the form of further briefing was occasioned by my inability to make the predicate determination called for by Larrison and Myers, and that left me seeking guidance where it seemed to me a matter of substantial uncertainty where perjury lay, if indeed it was perjury, as between two different pieces of testimony compounded by a third sought to be reconciling testimony, or whether indeed there was perjury at all.

The efforts of counsel to aid me are much appreciated. They have not significantly advanced

the discussion beyond where we were in July, but that's not because of any lack of diligence of the part of counsel.

The issues that we were exploring at the July hearing are essentially the issues now to be resolved.

The Larrison-Myers test is the one which prevails generally in federal courts, but it is not without its detractors. One of those detractors is the Second Circuit, in which the Stofsky case, which is 527 F2d, 237, in effect said that what Larrison and Myers meant, if faithfully applied, was that anytime there was any demonstration of perjury at trial by a Government witness who was of any materiality, a new trial was required because that always might have been the occasion for a different jury verdict.

Most particularly, though, the Second Circuit thought if the jury's attention was directed to a factor which the Second Circuit pointed out most of the other courts would have addressed this issue have neglected to address, the degree to which a disclosure of false testimony by a Government

witness would go in the jury's mind to the credibility of that witness. The Second Circuit canvass of earlier federal cases led to the conclusion that though other federal courts nominally follow Larrison, that they do so only nominally because in the generality of cases a new trial is denied where the Second Circuit felt real fidelity to Larrison would have called for its almost automatic grant whenever a determination is made of perjury at trial.

And so the Second Circuit opted for the so-called Berry standard, which refers to a venerable, very venerable, Georgia case, which is a standard of probability that the new trial should not be granted unless the new evidence that the trial testimony was false leads the trial judge to conclude that probably this would have changed the jury's view.

A recent decision by Judge Weber in the Western District, United States v. Willis, 467 F. Supp., 1111, read in effect to the widening of Myers, which is, of course, binding on all judges sitting in this Circuit, by reference to the

Second Circuit's Stofsky decision, so even in a case in which Judge Weber could not conclude that the absence of the false testimony might have led the jury to a different view, Judge Weber felt that a new trial was called for where the jury might very well have taken a very different view of the case if it had known that the important Government witness had committed perjury, and therefore, his credibility was open to serious challenge.

Judge Weber's Opinion seems to me a commendable approach in its own terms, though there is some irony in the fact that what the Second Circuit to be a limitation on the Larrison rule was utilized, if you will, as a liberalization of it, in the particular event. Actually, I think a careful view of what our Court of Appeals said in Myers shows that while adopting the Larrison rule it was not rejecting the Berry rule, because on the case before it the Court of Appeals found that either the Berry probability or the Larrison might-have-been-different standard was satisfied.

This review of the controlling cases will,

of course, strike those who have listened to my statement of the issue presented by the instant motion as in some sense irrelevant for the reason that the discussed cases have been cases in which a determination has been made that there was false testimony given at the trial, and I have already stated that I cannot make that determination in this instance. I could not in July, and I cannot now. Although I find Mr. Brown not to be an attractive witness -- there is nothing about him that suggests to me that fidelity to the truth is one of his principal traits -- I cannot satisfy that he was clearly testifying falsely on any of the questioned occasions at the trial of Mr. and Mrs. Paul, at the deposition, or here on the motion for a new trial.

Against that background, defense counsel have urged me to look at cases such as Mesarosh, 352 U.S. 1, or at the Second Circuit's Troche case, 213 F2d, 401, but rather at the dissent than at the Court's Opinion.

Defense counsel have argued that the Supreme Court's action in Mesarosh or the dissenting

Opinion of Judge Frank in Troche, and kindred cases, make clear that I have discretion "in the interest of justice" or in the exercise of my supervisory authority to direct a new trial if I am in grave doubt about the credibility of an important Government witness.

It is, of course, true that Rule 33 talks about the entry of a new trial "if required in the interest of justice."

It is true, of course, that there is a general supervisory authority that a trial judge exercises and is obliged to pursue at all times, but the authorities to which defense counsel point me do not seem to me to lead me to the grant of a new trial in this case.

Although Judge Frank was eloquent in his assertion of the discretionary authority of a trial judge in his dissent in Troche, Judge Swann for the majority with less eloquence but comparable precision was clear that where the trial judge could not make the predicate determination required by Larrison, at least then regarded as an authority prevailing in the Second Circuit, the

trial judge did not have the authority to grant a new trial. To be sure, the Troche Opinion is also cast in terms of discretion, and that really spells out the difference between Judges Swann and Frank in the particular instance, because Judge Frank felt that Judge Dimick had concluded that he had no discretion one way or another, but Judge Swann's Opinion may certainly be read for the proposition that without satisfaction of the Larrison predicate, that is, a determination that there was perjury, the called-for discretion did not exist.

I am unwilling to conclude that I have no discretion at all to order a new trial in the really, really extreme case, but I do not think this case lies in that area. In Troche itself there was in fact a recantation of testimony by a material Government witness, and then, as is not uncommon, a recantation of the recanting. Here we have no acknowledgement by Mr. Brown at any point that he has testified falsely. The reverse is true. He has steadfastly insisted that he has been truth-telling at all times, and maybe, indeed, he has been. One would certainly hope so.

Mesarosh is a case which the Second Circuit characterized in Stofsky in the following way at page 246 of 527, F2d, "This Court noted that Mesarosh is a sui generis case...involving 'that rate situation' where a key witness...had been conceded by the Government to have testified...in such a bizarre fashion as to raise the inference that he was either an inveterate perjurer or had a disordered mind."

The short of it is that I conclude that the predicate for the application of the Larrison or the Stofsky standards or Judge Weber's Willis standard, which is in effect an amalgam of the two, is not satisfied, because I have not made and cannot make a conclusion that Mr. Brown has, in my judgment, testified falsely on any of the occasions, let alone at the trial of Mr. and Mrs. Paul, which is the critical factual question.

Unable to make that determination, which takes the case out of the rubric of Larrison, Myers, Stofsky, Willis, I cannot find that this case is one which presents those pathological features which would call for the exercise by me of some

extraordinary discretionary authority to overturn a conviction arrived at after an extended trial.

The fact that Mr. Brown may not be my favorite witness does not seem to me to authorize me to pursue that aesthetic judgment to the point of directing a new trial in this case.

According, the motion for a new trial as it relates to both Mr. Paul and to Mrs. Paul is denied. I will enter an Order to that effect.

Any questions?

MR. GLAZER: Your Honor, may we set a sentencing date with respect to the two defendants?

THE COURT: Sure.

(A discussion was held off the record.)

THE COURT: Has there been a presentence report?

MR. GLAZER: I think there was.

MR. OSTRANDER: I believe in speaking to the Probation Officer assigned to the case, she has indicated to me that because of the large amount of time that has passed since she prepared that report, she will be required to prepare a supplemental report. Notwithstanding her request, I would ask

the Court to give us perhaps two weeks, twenty-one days, from today's date.

THE COURT: I guess if the supplementary report is to be done, it wouldn't require the normal six weeks, but maybe three to four. Mr. Davis will come back with his calendar.

(A discussion was held off the record.)

THE CLERK: Monday, November 15, 9 o'clock.

THE COURT: All right. Fine. We will see you then. Will you pursue with the Probation Office the matter of supplementing the report?

MR. OSTRANDER: Yes, I will, Your Honor.

THE COURT: Thank you. Tell them the limitations we are under. Thank you both.

(ADJOURNMENT AT 9:50 A.M.)

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 1983, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

Ronald F. Kidd

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Attorneys for Petitioner,
Bernard J. Marcus

Sworn to and subscribed before me this 21st day of October, 1983.

Adele M. Baldwin

Notary Public

ADELE M. BALDWIN
Notary Public, Phila., Phila. Co.
My Commission Expires April 21, 1986

Opposition

No. 83-679

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALBERT PAUL AND BEATRICE PAUL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioners' new trial motion based on newly discovered evidence, where such evidence raised the possibility that a government witness had lied at trial, but did not satisfy the district court that perjury had in fact occurred.

2. Whether the district court correctly denied petitioner Beatrice Paul's motion for judgment notwithstanding the verdict.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the order of the court of appeals (Pet. App. 3a-4a) nor the opinion of the district court (Pet. App. 5a-22a) is reported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1983. A petition for rehearing was denied on August 19, 1983. The petition for a writ of certiorari was filed on October 24, 1983, and was therefore six days out of time under Rule 20.1 of this Court's Rules. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted on three counts of willfully attempting to evade federal income taxes for 1974-1976, in violation of 26

U.S.C. 7201. Petitioner Albert Paul was sentenced to three years' imprisonment in a residential institution with a work release program on count one, to a fine of $10,000 and four years' probation on count two, and to a fine of $10,000 on count three (C.A. App. 4a). Petitioner Beatrice Paul was sentenced to three years' probation on count one and to fines of $5,000 on counts two and three (C.A. App. 8a). The court of appeals affirmed in an unpublished judgment order (Pet. App. 3a-4a).

Evidence introduced at petitioners' trial established the following: Petitioners operated Paul Tank Cleaning Service, Inc., which was engaged in the business of cleaning and servicing fuel tanks and selling oil products (C.A. App. 576a). The business was operated from petitioners' home throughout the period at issue (*id.* at 431a). Petitioners billed their customers separately for tank-cleaning services and for oil-product sales (*id.* at 86a, 438a-439a, 515a, 578a, 583a). Petitioners concealed the oil-sales receipts from the company's accountant, and showed him only the tank-cleaning invoices (*id.* at 85a-86a, 102a-103a, 438a-439a, 452a, 515a). During 1974-1976, the company earned receipts from oil-product sales in the amount of $450,000. None of these receipts was reported as income for federal tax purposes. *Id.* at 85a-86a, 438a-439a, 603a, 610a.

Petitioner Beatrice Paul maintained a money book summarizing the company's business transactions (C.A. App. 112a-113a). The documentation of the oil-product sales was segregated and kept in a manila folder in the back of the book (*id.* at 113a). Beatrice or her daughter prepared the invoices for oil sales (*id.* at 87a). Both Albert and Beatrice used the money book at billing time (*id.* at 115a). Beatrice noted collections on invoices (*id.* at 433a-434a) and on at least one occasion dunned an oil customer for payment (*id.* at 412a-414a). Beatrice signed checks for company expenses, including expenses related to the oil-sales portion of the

business (*id.* at 439a-440a, 453a-454a), and maintained the company's payroll and regular checking accounts (*id.* at 62a). Albert and Beatrice both dealt with the corporate books on a day-to-day basis (*id.* at 63a).

Petitioners' accountant, although he worked with Beatrice once a month for four to six hours, was never shown the money book (C.A. App. 451a-452a). He testified that he was unaware of the company's substantial oil-sales revenues and that he had been given to understand that 98% of its receipts came from tank-cleaning services (*id.* at 452a). He also testified that he had annually discussed the corporation's tax returns with petitioners, that he had commented on its increasing losses from tank-cleaning services, and that he had mentioned the possibility of an IRS audit as a result of claims for refund filed for 1973-1974 (*id.* at 474a-477a, 481a, 483a-485a, 489a, 535a-536a).

Petitioners were indicted for income tax evasion under 26 U.S.C. 7201 for their role in concealing from the I.R.S. the company's $450,000 in receipts from the sale of oil products. Ronald Brown, petitioners' former son-in-law and an employee of the company during the tax years at issue, testified for the prosecution pursuant to a plea agreement at petitioners' trial.[1] He testified that he had deposited the unreported oil-sales receipts into a checking account in his and Albert's joint names (C.A. App. 93a-94a). Once a check

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[1]Brown had been indicted along with petitioners for income tax evasion in connection with the company's tax returns, and had also been indicted on three counts of tax evasion in connection with his personal tax returns (C.A. App. 1a, 5a, 52a-53a). He pled guilty to two counts of the indictment and, under the plea agreement, could still have been prosecuted if any of his testimony at petitioners' trial had been false (*id.* at 52a-54a). Brown had not been sentenced at the time of the trial. He had married petitioners' daughter in 1967; they were separated after the tax years in issue, and divorce proceedings were subsequently instituted. Pet. 10.

cleared, Brown would split the proceeds with petitioners (*id.* at 96a). Brown also testfied that Albert had loaned him $50,000 in 1979 to buy a boat (*id.* at 249a-250a).[2]

After the jury rendered its guilty verdict, but before petitioners were sentenced, Brown testified at a deposition in connection with his pending divorce from petitioners' daughter. In that deposition, Brown stated that the funds he had used in 1979 to buy the boat included $50,000 received from his mother. He also denied having previously testified that the $50,000 had come from Mr. and Mrs. Paul (C.A App. 329a-330a). Citing this deposition testimony, petitioners moved for a new trial under Fed. R. Crim. P. 33 on the ground of newly discovered evidence (C.A. App. 3a, 7a).

The district court held a hearing, at which Brown stated that his testimony on both occasions had been true. He explained that the boat had cost $157,000 and that Albert and his mother had each provided him with $50,000 toward its purchase (*id.* at 329a-330a). He also testified that his denial of having received funds from Mr. and Mrs. Paul was truthful, since the $50,000 in question had come from Albert alone (*id.* at 330a). After additional briefing by the parties (*id.* at 380a-385a), the trial judge, acknowledging that Brown was not "an attractive witness" (Pet. App. 17a) and that Brown's deposition testimony "was not very forthcoming" (*id.* at 10a), nevertheless concluded: "I cannot satisfy [myself that Brown] was clearly testifying falsely on any of the questioned occasions, at the trial of Mr. and Mrs. Paul, at the deposition, or here on the motion for a new trial" (*id.* at 17a). The district court accordingly denied petitioners' new trial motion (Pet. App. 5a-21a).

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[2]The government apparently offered Brown's testimony about the boat, with its implication that Albert had a cash hoard available to him immediately following the tax years at issue, as further support for its contention that Brown had divided the unreported oil-sales receipts with petitioners (C.A. App. 32a-33a).

The court of appeals affirmed in an unpublished judgment order. It rejected petitioners' contention that a new trial was warranted because of a "good possibility" that Brown's trial testimony had been false, and held that there was sufficient evidence to convict Beatrice of tax evasion. Pet. App. 3a-4a.

ARGUMENT

1. The court of appeals properly refused to order a new trial in this case. There is no merit to petitioners' contention (Pet. 24-25) that the circuits are in conflict over the standards for granting new trial motions in situations like this. None of the cases petitioners cite (Pet. 25-27) holds that a new trial is warranted merely because a "good possibility" of false testimony is shown. Rather, the cases uniformly hold that the district court must be "reasonably well satisfied that the testimony given by a material witness is false." *Larrison* v. *United States*, 24 F.2d 82, 87 (7th Cir. 1928). Accord, *United States* v. *Meyers*, 484 F.2d 113, 116 (3d Cir. 1973); *United States* v. *Wright*, 625 F.2d 1017, 1019-1020 (1st Cir. 1980); *United States* v. *Wallace*, 528 F.2d 863, 866 (4th Cir. 1976); *United States* v. *Hamilton*, 559 F.2d 1370, 1372-1373 (5th Cir. 1977); *United States* v. *Briola*, 465 F.2d 1018, 1022 (10th Cir. 1072); *United States* v. *Mangieri*, 694 F.2d 1270, 1286 (D.C. Cir. 1982); *United States* v. *Krasny*, 607 F.2d 840, 842-844, 846 (9th Cir. 1979), cert. denied, 445 U.S. 942 (1980); *United States* v. *Stofsky*, 527 F.2d 237, 245-246 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976). In this case, the district court carefully studied Brown's trial and deposition testimony, as well as his subsequent explanation of that testimony at the hearing on the new trial motion. Having heard the testimony and observed Brown's demeanor, the district judge concluded that he could not reasonably satisfy himself that any of Brown's testimony (much less his trial testimony) was untrue (Pet. App. 11a-12a, 17a, 20a). As this Court held in

United States v. *Johnson*, 327 U.S. 106, 111 & n.5 (1946), a district court's finding as to the truthfulness of a witness's testimony is not reviewable and is sufficient to warrant the denial of a new trial.

Petitioners seek to avoid this result by contending (Pet. 28-45) that the court of appeals should have exercised its supervisory powers to order a new trial in the interests of justice based on the "good possibility" that Brown had testified falsely concerning the source of funds used to buy his boat. The grant or denial of a new trial motion, however, is a matter firmly within the discretion of the trial court. *United States* v. *Wright*, 625 F.2d at 1019; *United States* v. *Hamilton*, 559 F.2d at 1373; *United States* v. *Iannelli*, 528 F.2d 1290, 1292 (3d Cir. 1976). The district court properly exercised its discretion in declining to order a new trial here. It acted neither capriciously nor in haste. It held two hearings on the motion and requested extensive briefing by the parties. It studied Brown's testimony carefully and found itself unable to conclude with "a strong degree of certainty" (C.A. App. 379a) that any of it was false. The trial judge recognized that he had the discretionary authority to order a new trial in an extreme case, but concluded that this case did not qualify, noting that Brown had steadfastly maintained the truthfulness of his testimony and that the effect of additional evidence as to Brown's credibility would have been cumulative at best (Pet. App. 17a-19a). This exercise of discretion, based on the trial judge's first-hand assessment of the witness's veracity, does not merit this Court's review.[3]

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[3]None of the cases petitioners cite (Pet. 37-38, 40) requires a district court to exercise its discretion in favor of a new trial. In *Mesarosh* v. *United States*, 352 U.S. 1, 10 (1956), this Court ordered a new trial where the government itself asked for a hearing on the credibility of its witness after learning that he had lied in other proceedings; the Court relied heavily on the fact that the witness was in the government's

2. Petitioner Beatrice Paul contends (Pet. 35-51) that there was insufficient evidence to permit the jury to find her guilty of income tax evasion. This contention is meritless. The evidence established that she had worked in the business for many years; that she had prepared invoices, including those for oil sales; that she had dunned a customer for payment on oil sold to him; and that she had helped to conceal the oil-sales invoices from the company's accountant. Although the accountant described Beatrice as a woman of limited ability, he stated that she understood the difference between making and losing money (C.A. App. 51a). It was certainly permissible for the jury to conclude from this evidence that Beatrice was aware of the oil sales and that she participated in the failure to report them on the corporation's tax return. There is no reason for this Court to review that factual determination.

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employ and that the government itself questioned his credibility. In *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956), similarly, this Court's new trial order was based on uncontested charges against the witnesses and on the fact that their testimony had inevitably been discredited.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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